COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-3290

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JOHN TERESCHKO, COREEN A. WEBSTER, JULIE M. SIEMEK, EVELYN GOEBEL, PEGGY S. PODOLAK, JAMES H. SCHLEY AND HARRY SWEDA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] The State appeals a summary judgment for the respondents and an order denying summary judgment to the State. The

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

respondents were charged with violating the open meetings law by improperly meeting in closed session. Proof of scienter is necessary where a member in his or her official capacity knowingly attends a meeting of a governmental body held in violation of the open meetings law. The record in this case demonstrates that the respondents did not knowingly violate the open meetings law. Therefore, the judgment and order are affirmed.

¶2 John Tereschko, Coreen Webster, Julie Siemek, Evelyn Goebel, Harry Sweda and Peggy Podolak are members of the Gilman School Board. James Schley is the elementary and junior high school principal. They twice met in closed session to discuss the employment of several specifically identified teachers. The personnel exemption from the open meetings law, discussed below, applies only if personnel policies are discussed with respect to an individual employee. 80 OP. ATT'Y GEN. 176 (1992). Nonetheless, the respondents were charged with violating Wisconsin's open meetings law. WISCONSIN STAT. § 19.96 states in pertinent part:

> Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission shall forfeit without reimbursement not less than $25 nor more than $300 for each such violation.

¶3 WISCONSIN STAT. § 19.81 declares Wisconsin's general policy favoring official bodies openly conducting governmental business.

> (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

> (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

¶4 There are, however, exceptions to this policy, permitting officials to meet in closed session. The parties have briefed at great length whether one of these, as found in WIS. STAT. § 19.85(1)(c), applies to the facts of this case.[2] The trial court held that it did. This court, however, deems it appropriate to affirm on different grounds.

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[2] WISCONSIN STAT. § 19.85 provides in part:

> (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. … A closed session may be held for any of the following purposes:
> ….
> (c) Considering employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility.

The State takes the position that closed session is only appropriate to discuss the individual characteristics of a specific employee. If, however, the discussion turns to the general staffing needs, it goes beyond the narrow exceptions to the open meetings law. The State takes the position that the meetings in question involved declining enrollment and its affect on general staffing needs.

The respondents contend that under WIS. STAT. § 19.85(1)(c), a closed session may be convened to consider "any and all" employment related matters pertaining to an identifiable employee. They also argue that a governmental body may preliminarily discuss in closed session the reasons why some form of job action should be taken. The respondents suggest that it would be absurd to interpret § 19.85(1)(c) as permitting an official merely to make a recommendation affecting employment without the ability to explain his or her rationale. The respondents contend the topic of discussion was not simply declining enrollment, but that circumstance as a reason for considering the layoff of specified teachers. They also note that they considered other matters, such as some of the teachers' specific qualifications. Because this matter is disposed of on other grounds, this court will not address these arguments.

¶5 To determine the case on the same basis the trial court addressed would require this court to consider whether the closed deliberations of the board were authorized under WIS. STAT. § 19.85(1)(c). This would necessitate interpreting § 19.85(1)(c) to determine if the undisputed facts constitute a violation of the open meetings law. The problem with this approach is that neither party has evaluated the statute under the proper standard. Normally, WIS. STAT. § 19.81(4) requires courts to liberally construe the open meetings law to achieve the purpose of providing the public with the fullest and most complete information possible regarding the affairs of government.[3] This is the standard the State relies upon in its argument.

¶6 However, § 19.81(4) contains an exception for forfeiture actions:

> This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

"Section 19.81(4) provides that the rule of strict construction in favor of the accused, where construction is necessary, applies only where prosecutions for forfeitures are involved and not to other actions brought under the subchapter or interpretations thereof." 65 OP. ATT'Y GEN. iv-v (1976); *see also* ***State ex rel.***

[3] The purpose of Wisconsin's open meetings law is to give the public the fullest and most complete information regarding government affairs as is compatible with conducting governmental business. *See* ***Martin v. Wray***, 473 F.Supp. 1131, 1137 (E.D. Wis. 1979); *see also* ***State ex rel. Hodge v. Town of Turtle Lake***, 180 Wis. 2d 62, 70, 508 N.W.2d 603 (1993) (purpose of open meetings law is to protect public's right to be informed to fullest extent regarding affairs of government).

Lynch v. Conta, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).[4] Thus, depending on the purpose for which the open meetings law is being construed, it appears possible that there could be parallel interpretations of the same subsection. This court deems it appropriate to avoid making that potentiality closer to reality under the circumstances of this case. As indicated, the parties have not addressed WIS. STAT. § 19.85(1)(c) under the proper standard set forth in WIS. STAT. § 19.81(4). Moreover, there is a narrower dispositive basis upon which to affirm the trial court.

¶7 The issues presented by this case involve applying the law to undisputed facts, a question of law. The standard of review is therefore de novo. ***In re D.S.P.***, 166 Wis. 2d 464, 471, 480 N.W.2d 234 (1992). On review of summary judgment, as on review of other decisions, this court may affirm the trial court's holding on a theory or reasoning different from that relied upon by the trial court. ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995). While appellate courts need not and ordinarily will not consider or decide issues that are not specifically raised on appeal, ***Waushara County v. Graf,*** 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992), for the reasons given, this court deems it appropriate to dispose of the case on the narrowest possible grounds. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). This is not an instance as in ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995), where the court held that "[w]e will not ... blindside trial courts with reversals based on theories which did not originate in their forum."

[4] ***Lynch v. Conta***, 71 Wis. 2d 662, 239 N.W.2d 313 (1976), held that "[i]f the respondents here were involved in a direct forfeiture action, they would be entitled to have a strict construction. The same rule would be appropriate if they commenced the declaratory judgment action." ***Id.*** at 676.

¶8 Proof of scienter is necessary where a member in his or her official capacity knowingly attended a meeting of a governmental body held in violation of the open meetings law. 65 OP. ATT'Y GEN. iv (1976). In ***State ex rel. Hodge v. Town of Turtle Lake***, 180 Wis. 2d 62, 508 N.W.2d 603 (1993), the supreme court held that the town board improperly considered in closed session Hodge's permit application to store junked automobiles. Nevertheless, the court held that the board members were not subject to forfeitures under WIS. STAT. § 19.96 because they did not "knowingly" violate the open meetings law.

> The members of the Board clearly attempted to abide by the Open Meetings Law by contacting two attorneys before deliberating in closed session. Moreover, they believed that they were authorized to deliberate in closed session and thus, did not "knowingly" violate the Open Meetings Law. Therefore, their actions do not warrant the penalty under sec. 19.96, Stats.

Id. at 80.

¶9 In this case, Podolak, the board's president, averred in her affidavit

> 3. That in advance of the February, 2000 Board meeting, this Affiant did speak with Administrator Fuhrmann about the proposal of discussing possible teacher layoffs or reductions in hours with Principal Schley as well as regarding the process of engaging in evaluations of specified teachers during the course of that meeting. That Mr. Fuhrmann advised me that he had spoken with Attorney Stephen L. Weld about potentially undertaking this business in Closed Session and that he had been advised that this was authorized under § 19.85(1)(c), Wis. Stats., as well as under sub. (1)(f) in light of the belief that information which could have a substantial adverse impact upon reputations might also be discussed, in particular as related to the performance of then principal, Al Arnold, when during the 1998-1999 school year he calculated special needs student requirements and recommended retention of the same number of special needs teachers for the 1999-2000 school year.

> 4. That this Affiant was a member of the School Board in 1998 when an accusation was made that the School Board violated the Open Meetings Law and at all times since that accusation was made, it has been the practice of this Affiant to make certain that meeting notices, together with a determination that matters proposed to be discussed in Closed Session have been in compliance with the law. That, realizing what the proposed subject matter of the proposed Closed Session for the February, 2000 School Board meeting was to consist of, this Affiant did personally consult with attorneys Brett Pickerign of the School Boards Association and Joel Aberg[5] for additional opinions that what the Board intended to discuss in Closed Session was proper and in accord with the law. That this Affiant was so advised by these consultants that, in their opinion, the Board could adjourn into Closed Session under § 19.85(1)(c) and (f), Wis. Stats. for the described business, consistent with the law.

¶10 Before deliberating in closed session, the board, through its president, attempted to abide by the open meetings law. Podolak consulted with a school administrator who had obtained legal advice and personally contacted two attorneys. Based upon the advice they received, the respondents believed they were authorized to deliberate in closed session.[6] Therefore, under ***Hodge***, they did not violate WIS. STAT. § 19.96. The summary judgment granted to the respondents and the order denying the State's motion for summary judgment are affirmed.

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[5] This court takes judicial notice that Joel Aberg was and is a member of the law firm representing the respondents on appeal. *See Wisconsin Lawyer Directory* 8 (2000 & 2001 eds.); *see also* WIS. STAT. § 902.01(3); ***City of Edgerton v. General Cas. Co.***, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), *rev'd in part on other grounds,* 184 Wis. 2d 750, 517 N.W.2d 463 (1994); George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 43-45 (1960).

[6] The respondents' summary judgment affidavits each imply their belief that it was permissible to conduct the discussions concerning the continuing need for certain specific personnel. This implicit belief was reasonable, as evidenced by the trial court's conclusion that the exemption covered the closed sessions in question.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.